Due service of the within Brief on Behal
Plaintiff in Error is hereby admitted this
day of January, A. D. 1898.

Attorneys for Defendant in Erro

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 275.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, PLAINTIFF IN ERROR,

vs.

RICHARD P. THOMAS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

The concluding portion of the brief of respondent in error is devoted to his theory, which was adopted by the supreme court of California, that this action is one of simple tort. We have tried to demonstrate in our opening brief how utterly untenable that theory is, both on principle and authority. We were not aware till recently, however, of a line of rulings by this court that any objection that a suit is at law and not in equity must be raised before defend-

ants join issue, and that in the appellate court *such objection is entirely too late.*

Reynes *vs.* Dumont, 130 U. S., at p. 395, affirmed in Kilbourn *vs.* Sunderland, 130 *id.*, at p. 514.

(In the latter case, moreover, at bottom of page 514, the superiority of the equitable remedy over the legal one is emphasized in cases of fraud, trust, *fiduciary relations*, and *account.*)*

It thus appears from the above cases, and the prior decisions of this court which they sustain and follow, that the chief point on which the court below rests its decision of reversal, viz., the point that the action is one at common law or in tort, was raised too late, as it appears by the record that this point was never made in the trial court. There the action was by both sides assumed to be just what it was termed—"a bill in equity for an accounting."

This case affords a striking illustration how salutary is the rule that the objection to the form of action must be raised in the trial court; in fact, how essential is the rule to plaintiff's protection. In the trial court plaintiff in error pleaded facts showing an infraction of sections 5200 and 5239, Revised Statutes of the United States, as pointed out at bottom of page 31 *et seq.* of our opening brief. Had the theory of respondent and the supreme court of California, that we were not seeking to enforce any rights conferred by the National Bank act been developed at the trial, we could readily have amended by referring in express terms to sections 5200 and 5239, as well as to section 5136 (4, 5, and 6), of the Revised Statutes as the basis of our right to sue in equity and adopt by-laws imposing on defendants other than mere common-law duties. But we were given no intimation of any doubt by our opponents as to either the

* Moreover, this court has held that the features of case at bar stamp an action *as one in equity.* (Horner *vs.* Henning, 93 U. S., p. 232, affirmed in Stone *vs.* Chisolm, 113 *id.*, p. 309.)

form or nature of our cause of action. We accordingly relied on the general averments that we were incorporated under the Federal statute and adopted by-laws in accordance therewith as sufficient basis for our equitable and statutory rights.

If we were in error on this point, we assuredly had a right to have the pleadings amended and their final nature settled in the trial court, instead of which respondent in error was allowed to keep in reserve his objection to our form of pleading until (after all his other objections had failed) he reached the State supreme court.

(1.) RESPONDENT'S CLAIM THAT COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

Under this head respondent in error claims, at page 9 of his brief, that no *culpable* negligence is shown. He urges that no actual fraud is charged against the defendant or the reckless and utterly irresponsible cashier, and seems to clearly assume that negligence in such cases is not actionable in the absence of actual fraud. It is true we do not plead actual fraud in this case where we rely on negligence. That would be improper (Fox *vs.* Hale & Norcross, 108 Cal., at p. 424, bottom). But we charge very gross negligence, almost amounting to actual fraud, against the cashier (Tr., pp. 6, 7). We also charge what amounts to constructive fraud against the defendants themselves (Tr., bottom p. 5 and top p. 8). In fact these defendants, it is charged, had in effect abdicated. They were mere "figure-heads," coming within the condemning language of this court in Briggs *vs.* Spalding, 141 U. S., at p. 465, bottom. The doctrine that directors of corporations, especially bank corporations, are liable for negligence as well as fraud is too firmly settled to be questioned.

"It is gross negligence in bank directors to commit the entire business of the bank to the cashier without supervision

or control on their part, although he may be an entirely competent man, and they are responsible in such case for all losses to the corporation from the *negligent* or criminal acts of the cashier, provided such losses could have been prevented by the exercise of proper diligence on their part."

Wallace *vs.* Lincoln Sav. B'k, 89 Tenn., pp. 631-'2.
Delano *vs.* Case, 19 Brad. (Ill.), 538.

For the liability of directors, and especially the president of a corporation, "by reason of negligence":

Cook on Stock and Stockholders, § 701-'3.
1 Morawitz on Corp., § 551, and cases cited.
2 Pomeroy Eq. Jur., § 1094.

Also Marshall *vs.* F. & M. Bank, 8 S. E., from p. 589 (last par.) to p. 591. 23 N. E.

Onderkirk *vs.* C. N. B'k, p. 877, lower part of first to middle of second column.

In this connection it is rather significant that the quotations from respondent's own cases, on pages 12 *et seq.* of his brief, show not only an entirely different state of facts from those in case at bar, but that under such facts the courts would have ruled differently. Thus in Witters *vs.* Soules (p. 12, Resp. Brief) stress is laid on the fact that cashier was of "large experience, able and competent;" but so little confidence was reposed in him in case at bar that he was put under direct supervision of executive committee and under supervision and *control* of president. See by-laws 7, 17, and 19, on pages 3 and 19 (last par.) of transcript.

So, in case of Clews *vs.* Bardon, it is emphasized on page 15 of respondent's brief that the directors charged were not clothed with any duties as president or executive committee; but even then "if they willfully shut their eyes or are guilty of such gross neglect as amounts to bad faith, they will be held responsible." (Bottom p. 16, Resp.'s Brief.)

(2.) RESPONDENT'S CLAIM THAT THE CAUSE OF ACTION, IF ANY, WAS AGAINST DEFENDANTS AS DIRECTORS MERELY, AND THAT BOARD OF DIRECTORS CANNOT DELEGATE ITS POWERS.

We quite fail to see why this objection comes under caption that bill states *no* cause of action. That it may also state a cause of action against defendant's associates does not go to show that it does not state a cause of action against the original defendants or the present defendant. This objection is for non-joinder or defect of parties. It was not raised by demurrer or answer and cannot be made on appeal.

Cal. Code Civ. Proc., §§ 430–'4.
Callahan *vs.* Bode, 84 Cal., p. 496.
Smith *vs.* Dorn, 96 *id.*, p. 83.

Aside from respondent's waiver of the foregoing objection, there is no merit in it.

"Members of executive committees of corporations are *personally* liable for losses happening through their mismanagement."

Thompson's Commentaries on Corporations, vol. III, § 3963.

Where but one director out of seven was sued it was held:

"If there be culpable negligence on the part of a director, an action may be maintained against him without joining his associates."

Horn *vs.* Silver M. Co., 42 Minn., at p. 199, and cases cited.
Shea *vs.* Mabry, 69 Tenn., at p. 344.

(3.) THE CLAIM THAT OUR BILL FAILS TO SHOW THERE ARE OTHER STOCKHOLDERS THAN PLAINTIFF.

Bill does aver that there were divers other stockholders (Tr., m. p. 2), and that there were seven directors (m. p. 4). If there was a formal defect in not averring that the other

stockholders were numerous, such objection must also be taken by demurrer or answer or be deemed waived.

Stewart *vs.* Erie Co., 17 Minn., top p. 373.
Cal. Code Civ. Proc., §§ 430–434.

Moreover, this court, in a similar case, has held it is immaterial whether there are other stockholders or not.

Stone *vs.* Chisolm, 113 U. S., p. 309 (end of opinion).

(4.) THE CLAIM THERE WAS NO PROPER DEMAND ON CONTROLLER OR CORPORATION TO BRING SUIT.

This is, at most, another formal defect which should have been raised by demurrer.

Hill *vs.* Haskin, 51 Cal., pp. 177–'8.
Cal. C. P., § 430–'4.

Moreover, in this case respondent shows that we asked both receiver and controller to sue, only omitting to ask the controller to ask the receiver to do so. This distinction is too fine. The law disregards trifles. It looks through the shadow to the substance. "The law neither does nor requires idle acts."

Cal. Civil Code, § 3532.

We pleaded that the controller and receiver refused to bring the suit asked or *any* suit, or to take *any* action (Tr., m. p. 22). A further demand was obviously useless.

"Where it appears it would be useless to make a demand, no demand is necessary to be alleged." (Smith *vs.* Dorn, 96 Cal., 73.)

As for the necessity of obtaining leave from the controller to sue, such a rule applies only to *court* receivers. This court has pointed out the radical distinction between the two kinds of receivers in Porter *vs.* Sabin, 149 U. S., 478; also

in another branch of this case. (*Ex parte* Chetwood, 165 U. S., at p. 457.)

THE JURISDICTIONAL QUESTION.

The court not having finally adjudged this question, we feel constrained in closing to refer to an authority which seems to have a very direct bearing in the Stateler case, which is but a branch of this (165 U. S., p. 456). The case referred to is that of—

Hot Springs School Dist. *vs.* Nat. Bk., 61 F., 417.

Further grounds of answer to respondent's claims and points have already been covered in our opening brief. For the reasons there and here presented, we respectfully submit that the judgment of the California supreme court should be reversed and the judgment of the superior court of San Francisco be reinstated.

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